Reframing Debate of the PSTN-to-IP Transition: Lessons from U.S. v. Canadian Experimentation

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Overview

Misframing of the Policy Debate

- The policy debate within the recent trajectory of U.S. deregulatory policies, and most recently for the PSTN-to-IP transition, *continues to be misframed*.
- Some parties - industry members, scholars and even FCC Commissioners (both current and former) – assert in varying ways that historical telecommunications regulation is based on a monopoly model, and thus traditional obligations should no longer be applicable in a competitive marketplace.
- For purposes of discussion here, such assertions will be referred to as “monopoly theory”.

Misdirects Future Policy Trajectories

- The monopoly theory is simply, factually false.
- Viewing traditional obligations from the monopoly theory perspective
  - Misrepresents history;
  - Fails to recognize *how* the historical regulatory regimes led to the emergent properties of widespreadly available, affordable and reliable networks;
  - Misdirects inquiry and analysis of future policies; and
  - Contributes to adoption of policies that undermine sustainability of such emergent properties.

As Illustrated by the Policy Trajectories In the U.S. and Canada

- The traditional, telecommunications regulatory regimes in the U.S. and Canada have followed similar trajectories
  - Sharing the same common law origins
  - Developing similar dual-jurisdictional and federal statutory regimes.
- However, since the 1990s, their deregulatory policy trajectories have diverged.
  - The U.S. trajectory continues to be influenced by a monopoly theory perspective;
  - The Canadian trajectory reflects a rejection of the monopoly theory perspective.

Learning from Policy Results of U.S. v. Canadian Experimentation

- A comparison of U.S. v. Canadian deregulatory policies reveals critical differences in their trajectories:
  - Loss v. retention of providers' traditional obligations, such as an obligation to serve
  - Loss v. retention of stand-alone wireline access lines for customers
  - Loss v. retention of wholesale interconnection obligations
  - Loss v. retention of judicial remedies for customers
- The FCC should examine the ongoing natural experiments in the U.S. and Canada.

Misleading Assertions Related to Monopoly and Competition

Common Carriage is Based on Monopoly

"[The] fundamental predicates of common carriage are the presence of a natural monopoly."

(Former FCC Chairman Michael Powell, quoted in *Communications Daily*, Feb. 7, 2012, p. 1).

Historical Regulation Requires Monopoly

"I believe that the FCC must clearly signal that it will not apply a 20th century model of economic regulation to IP networks. That model, based on a monopolist providing voice services over copper-wire networks, is obsolete. The marketplace has changed, and our regulations need to change too. …Item #1 on our list should be closing the Title II reclassification docket."

(*Opening Remarks of FCC Commissioner Ajit Pai Before the Internet Transformation Panel of the Communications Liberty and Innovation Project*, Washington, DC, October 16, 2012).

Historical Obligations Are Incompatible with Competition

"Traditional public utility style regulation of the telecom industry is 'so last century, … I'm not suggesting an anarchist approach to telecommunications policy,' but the laws must be updated 'to reflect modern realities of a well-functioning market.'"

(Prof. John Mayo, Georgetown University, quoted in *Communications Daily*, October 10, 2012, p. 17)

Historical Obligations Are Inappropriate in an IP World

"AT&T believes that this regulatory experiment will show that conventional public-utility-style regulation is no longer necessary or appropriate in the emerging all-IP ecosystem."

(*AT&T's Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, filed Nov. 7, 2012, p. 6)

These Assertions Misrepresent the Underlying Bodies of Law

- These assertions of "monopoly theory" misrepresent – whether intentionally or not – the underlying bodies of law and the reasons for their evolution.
- As a result, these assertions are misleading, and misdirect policy debate concerning the transition from the PSTN-to-IP.

U.S. and Canadian Telecommunications Regulation Evolved in Layers

Layers of Legal Innovation Underlying Telecommunications Regulation

The regulatory framework from which U.S. deregulatory telecommunications policies are evolving was the result of successive (four) layers of centuries-old policy evolution and legal innovation.

- Common law of common carriage
- Federalism
- Common law of public utilities
- Federal and state statutory law

The Layers of Prior Legal Innovations

Late 19th Century:	Federal and State Statutory Law
19th Century:	Common Law of Public Utilities
Late 18th Century:	Federalism under U.S. Constitution
Middle Ages:	English Common Law of Common Carriage

U.S. and Canada Share the Same Layers of Legal Innovation

Both the U.S. and Canada:

1. Shared the same English common law origins.
2. Established government structures based on federalism, within which shared jurisdictional regulation evolved.
3. Developed federal statutory regimes of common carriage
   - Codifying common law obligations.
   - Creating a federal agency with regulatory oversight.
   - That was initially established for railroads and later applied to telegraphy and telephony.
4. Transferred regulatory jurisdiction to a new federal agency with jurisdiction over numerous communications technologies.

Recent U.S. and Canadian Policy Divergence Begins With the First Layer

Beginning of Policy Divergence

- In the 1990s, both the U.S. and Canada made significant statutory modifications to their telecommunications regulatory regimes:
  - Seeking to increase reliance on market forces,
  - While retaining regulation as needed to protect other policy objectives.
- But the policy implementation of the respective statutes has since diverged, although the two nations share similar challenges.
- For example, both nations' key statutory definitions - whether old, modified or new – require interpretation with evolution of technology and business strategies.

U.S.: Inapplicability of Common Carriage

- The FCC has classified broadband access Internet service as an "information service" rather than a "telecommunications service".
- This decision modifies application of the **fourth layer** by eliminating legal status as common carriers, thereby
  - Dismantling the obligations derived from the **first** layer;
  - Requiring construction of a **new first layer** (under FCC's Title I ancillary jurisdiction)
  - Leading to adoption of network neutrality rules that may not be sustainable upon appeal.

Canada: Applicability of Common Carriage

- By contrast, the CRTC has
  - Found primary ISPs to be Canadian carriers;
  - Required primary ISPs to provide wholesale services on a tariffed basis to secondary ISPs;
  - Required secondary ISPs to abide by certain common carriage obligations, by directing all primary ISPs to include such requirements in wholesale service contracts; and
  - Established principles for IP voice network interconnection.
- As a result, Canada preserves the **first layer** of obligations that are embedded in its application of the **fourth layer**.

Confronting the Misleading Monopoly Theory

Rejecting the Monopoly Theory

- The CRTC's application of the statutory common carriage framework to the PSTN-to-IP transition reflects rejection of the monopoly theory.
- This rejection was made explicit in the proceeding *Obligation to Serve* when the CRTC examined telecommunications carriers' obligation to serve in forborne – that is, competitive – exchanges.

Through Procedures That Allow Direct Confrontation of Assertions

- In the *Obligation to Serve*, parties filed testimony and legal opinions, and the CRTC held a multi-day hearing where Commissioners themselves questioned parties' counsel and expert witnesses.
- Certain parties, primarily TELUS, asserted that the obligation to serve could only be lawfully imposed where there is a monopoly.

Based on Historical Analysis of Telecommunications Regulation

- I participated in this proceeding on behalf of the Public Interest Advocacy Centre (PIAC),
  - Submitting a legal opinion,
  - Participating in the hearing, and
  - Responding to direct questioning by CRTC Commissioners.
- My legal opinion explains, through a historical analysis of the legal evolution of telecommunications regulation, why the monopoly theory is wrong.
  - A copy of my legal opinion will be submitted with my ex parte filing of this presentation.
  - Some elements of this history are summarized in the slides marked as Appendix to this presentation.

CRTC Rejects the Monopoly Theory

In its decision, the CRTC expressly rejected the monopoly theory:

"Certain parties submitted that an obligation to serve can only be lawfully imposed where there is a monopoly. Because there is no monopoly, these parties argued that the Commission does not have the legal authority to impose an obligation to serve in forborne exchanges. The Commission notes its disagreement with this argument. In the Commission's view, it is unduly narrow, is inconsistent with the broad statutory powers granted to the Commission, and fails to recognize the broad policy objectives to which the Commission must have regard."

(*Obligation to Serve and Other Matters*, Telecom Regulatory Policy CRTC 2011-291, May 3, 2011, FN 33)

The Obligation to Serve Retained in Forborne Exchanges

- Instead, in its decision the CRTC
  - Retained the obligation to serve for ILECs in regulated exchanges; and
  - Retained the obligation to provide stand-alone primary exchange service in forborne exchanges.

- Note: In Canada, approximately 90% of such primary exchange lines are broadband capable, using a definition of broadband similar to that reflected in the FCC's ICC/CAF order.

Differences in Administrative Procedures Between U.S. and Canada

Substantial Differences in Administrative Procedures

- CRTC
  - Holds hearings, with presentation of testimony, and even questioning of witnesses directly by Commissioners.
  - Assesses regulated companies to pay for costs of PIAC, a not-for-profit organization representing consumer interests, to retain expert witnesses.
- FCC
  - Relies on paper pleadings and comments, without hearings.
  - Relies on ex parte communications, which has been criticized in a recent NARUC resolution.
  - Regulated companies are not assessed to pay for costs of expert witnesses retained to represent interests of consumers.

Contribute to Different Policy Outcomes

- Different procedures between the FCC and CRTC are contributing to different policy outcomes.
- The CRTC procedures better enable direct confrontation of assertions by industry, such as the mischaracterization that regulation requires monopoly and is inappropriate in a competitive environment.

Conclusions

- The FCC should examine the ongoing natural experiments in the U.S. and Canada.
- The FCC should squarely address and question, not simply assume, the assertions of monopoly theory in making policy determinations related to the PSTN-to-IP transition.
- The FCC should consider utilizing administrative procedures that enable more direct confrontation and rigorous analysis of opposing perspectives.

Coda

- The recent divergence in U.S. and Canadian policy trajectories is widening by virtue of recent Supreme Court decisions in the respective nations.
- With regard to the enforceability of mandatory arbitration clauses with class action waivers in wireless provider contracts:
  - In *AT&T v. Concepcion*, the U.S. Supreme Court upheld enforceability, based on preemption of state law under the Federal Arbitration Act; whereas
  - In *Seidel v. TELUS*, the Supreme Court of Canada ruled that a British Columbia consumer protection statute overrode the arbitration clause.
- As a result, in the U.S. there is a loss of judicial remedies for customers relative to Canada.

Appendix:
The True, Non-Monopoly Origins of Telecommunications Regulation

Origins of Telecommunications Regulation Under The Common Law

- Telecommunications carriers are both common carriers and public utilities under the common law, which are two different legal statuses.
  - Some entities may be only common carriers OR public utilities.
  - But some entities may be both, such as railroads and telecommunications carriers.
- Telecommunications carriers bear numerous obligations based on this dual-status as a common carrier and public utility.

Tort Origins of Common Carriage

- Common carriage obligations are based on tort law, imposing relational norms and providing civil recourse for legal norms.
- These obligations are not based on market structure, such as the requirement of a monopoly.
- These obligations are:
  - To serve upon reasonable request (a duty to serve)
  - Without unreasonable discrimination
  - At a just and reasonable price
  - With adequate care

What Is Tort Law?

"Tort law is first and foremost a law of responsibilities and redress. It identifies what we will call 'loci of responsibility.' These loci consist of spheres of interaction that come with, and are defined (in part) by relational duties: obligations that are owed by one person to others when interacting with those others in certain contexts and in certain ways. Beneficiaries of this special class of duties enjoy a concomitant privilege or power; they are entitled to seek legal redress if injured by the breach of one of these duties."

(John C. P. Goldberg & Benjamin C. Zipursky (2005), "Accidents of the Great Society," 64 MD. L. REV. 364, 368)

Grant of Franchise As Origins of Public Utility Obligations

- Public utility obligations arise from the grant of some governmental powers in franchises to provide a public service.
- Such franchises include eminent domain, the power to use streets and highways, and the exclusive performance of some undertaking.
- The common law implies a duty to serve that is imposed on an entity by virtue of acceptance of the franchise, *which may or may not be exclusive*.

History of U.S. Federal Statutory Common Carriage

- The history of the U.S. federal statutory regime of common carriage is clear that regulation applies without monopoly.
  - Based on detailed investigation by a Senate Select Committee on Interstate Commerce ("Cullom Committee"),
  - Described in the Cullom Report (1886),
  - Which led to enactment of the Interstate Commerce Act of 1887,
  - Amended in 1910 to apply to telegraphy and telephony, and the predecessor of the Communications Act of 1934.

The Cullom Report (1886): The True Reasons for Federal Regulation

- The Cullom Report identified the key policy issue as *the rise of corporate power*, in this case as exists in the transportation industry of railroads.
- Key findings in the Cullom Report
  - "Railroads are the arteries through which flows the life-blood of the world's commerce";
  - Competition is insufficient to protect customers from unjust discrimination and oppressive practices.
  - Common law remedies are inadequate.
  - States lack jurisdiction over interstate commerce.
  - Need for some uniformity in regulation of a network industry.

Forgetting the True Origins?: U.S. v. Canada

These findings by the U.S. Senate in the Cullom Report:

- Appear to have been forgotten by the FCC in implementing the *Telecommunications Act of 1996*.
- Are being overshadowed in policy debate in the U.S. by industry rhetoric that regulation requires, or is only appropriate in, a monopoly environment.
- But, are consistent with findings by the CRTC in applying the *Telecommunications Act of 1993* in Canada.